No. 309.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

WILLIAM H. DANFORTH, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

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ON THE QUESTION OF "TAKING."

We are just in receipt of the Government's brief, today, November 3, 1939, and hasten to briefly reply to the same.

It is first said (Government's Brief, page 6) that "No part of the set-back levee has been or is to be built on the land involved in this proceeding." We have heretofore touched on this point (Petitioner's Brief, page 5) to indicate that when the strip of 105.34 acres was cut off the western side of petitioner's farm it was not an isolated or independent transaction of the Government, but was part and parcel of the project here under consideration, namely,

the Floodway Control Plan. The Government had no need or use for this strip of land unless it was used in connection with the project under consideration. It follows, therefore, that the Government's attempt to separate the taking of the strip of land in question from the project as a whole must of necessity fall flat. The taking of the strip in question, followed by the building of the set-back levee, on the strip, was part of the Floodway Project and was an important step in the same because, without the set-back levee, the project could not proceed or operate. The Government could have condemned the easement and the strip in question in **one action at the same time.** There certainly would have been no question about a **"taking"** if the Government had done that. The mere fact that the Government saw fit or found it more convenient to file two condemnation suits instead of one does not change the date of taking. We had this very question in mind when we asked the Government engineer, Mr. Miller (Record p. 196), if it was not all one project. (This is referred to in Petitioner's Original Brief, page 25.)

It is next contended that Colonel Reybold, in dynamiting the levee, did so without orders from any of his superiors. Colonel Reybold was the officer in charge of the Memphis Engineers District No. 1. He had no superior in that area. He had the authority and the right, as he testified, to place the Birds Point-New Madrid Floodway in operation (Rec. pp. 196, 197, 199). He did so. In this connection, counsel for the Government suggest that the position of the petitioner is not clear regarding the authority of Colonel Reybold to do this act (Government Brief, p. 40). On page 27 of petitioner's brief a reference is made to the record, page 200, showing not only that the Government had control, but that after the flood of 1937 the Government rebuilt the riverside levee. Colonel Reybold was in charge and had full authority. There is no

presumption that he was acting without authority. The floodway project belonged to the Government. The Government had a right to put it in operation. The Government is now trying to make a tortious act out of the conduct of Colonel Reybold. We do not say, as the Government suggests, that the acts of the Government in 1937 constituted the time of taking. The taking had already taken place long before, when the set-back levee was started, in 1929 or, at any rate, when it was completed in 1932. In 1937 the Government simply exercised its right to put the floodway into operation. How would the Government put the project in operation other than it did in 1937? The cutting down of the three feet in the fuse-plug section was only one step in the Jadwin Plan. This did not prevent the operation of the Plan by the Government in 1937. If the fuse plug had been cut in 1937 the only difference would have been that the water would have passed over the riverside levee at fifty-five feet instead of at the point where it did. The set-back levee would have functioned exactly as it did. It was completed in 1933 and ready to operate. The failure to cut off the three feet would not have prevented the operation at any previous time. After the building of the set-back levee the project was placed in a position where it could be operated, and it would have been operated by the Government prior to 1937 had the occasion arisen. Can anyone doubt this? The failure to cut the fuse-plug does not prevent a taking. The cutting of the fuse-plug has nothing to do with the time of taking. The time of cutting is left to the Government. The mandate in the act is to give "the areas within" the same degree of protection as is afforded by levees on the west side.

It is difficult to understand how anyone can argue that putting the project in operation was in violation of the mandate of Congress (Government's Brief, p. 40). There

is nothing in the Floodway Control Act that prohibited the operation of the floodway as soon as it was ready to operate. We think counsel have wholly misconstrued the intent and purpose of the act when they contend that the floodway cannot be placed in operation until the Government has paid for the easements or the land in question. Congress never intended this project to be held up until such time as the Government paid. Payment is not a prerequisite to a "taking." Suppose in 1933, or as soon as the set-back levee was practically completed, there had been a major flood. Does the Government contend for one minute that it would not have put this floodway into operation, simply because it had not entered up judgments or had not paid for the easements in the floodway area? To ask this question is to answer it. Besides, the action of the Government in dynamiting the levee in 1937 is a sufficient answer to this question. The provision of the act that the Government refers to provides:

> "**Provided further**, That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening and enlarging the levees on the east side of the river."

Where is there any mandate in this provision forbidding the Government from operating the floodway or from taking it? On the contrary, the mandate is to have **the Government** give the same degree of protection as was afforded by levees on the west side of the river contiguous to the levee at the head of the floodway. In other words, the act itself provides that the **Government** is to assume

charge and is to give the same degree of protection. Do counsel for one moment seriously contend that the local levee districts would have a right to build up the levee to, let us say, sixty-five feet, which could be done as a practical engineering proposition?

Counsel for the Government state that Section 14 of the River and Harbor Act of March 3, 1899, forbidding interference with levees and other structures made applicable by Section 8 of the 1928 Act, only applies to structures "built." We think that a reference to the said act will show otherwise. It refers not only to "work built by the United States" but refers to "any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, etc." It obviously was the purpose to protect such works; whether built by the United States or not, so long as they are under the control of the United States. Furthermore, a levee built by the United States after a levee has been torn down or dynamited or in any way removed and then rebuilt by the United States is a levee built by the United States within the purview of this statute. We have no desire to repeat what we said on pages 26, 27 and 30 of petitioner's brief, but it is obvious that the floodway area, the set-back levee, and the riverside levee in the fuse plug were wholly under the jurisdiction of the United States, and no private individual, or group of private individuals, including levee districts, had or have any legal right to interfere with the riverside levee or the set-back levee or any part of the same, nor had they any right to interfere with the operation of the floodway, after the Government took charge, October 21, 1929, and certainly not after the set-back levee was completed on October 31, 1932. Besides, what right did the

Government have to restore the riverside levee after the flood of 1937, if it did not have control and jurisdiction over the same? What right did the Government have to first issue instructions to restore the same to the height of fifty-five feet on the Cairo gauge, and then to countermand the order, and restore it to fifty-eight feet on the Cairo gauge? The record shows (R. p. 200) that the instructions were issued from the office of General Edward M. Markham, and came through military channels, in the regular and usual way. It would seem that the present position of the Government is wholly inconsistent with its action and its position at that time, in 1937.

The brief of the Government then discusses the question as to which water reached the petitioner's land first, that from the natural crevasse or that from the artificial crevasse. What difference does it make in this case? This is not a suit for damages caused by the flow of water, either from a natural or an artificial crevasse. This is a suit to acquire an easement and the questions involved are those of a "taking" and those of certain rights growing out of an admittedly valid contract between the Government and the landowner, and the question of which water reached the petitioner's land first is wholly immaterial. It is impossible to tell at this time whether the water from a natural crevasse or from an artificial crevasse will reach these lands first during the next flood. It depends upon where the crevasse will be upon wind conditions, and upon other factors. The question of which water reached the petitioner's land first constitutes no evidence of a taking.

It is then contended by the Government that there is no evidence in the record to show that the estimated increase in depth during the 1937 flood did actually cause any damage to petitioner's property which would not otherwise have occurred. We have heretofore shown in

petitioner's original brief (page 7) that the effect of the set-back levee is to increase the depth, velocity and duration of the overflow over and above what the depth and velocity and duration of the overflow would be without the set-back levee. We have no desire to repeat what we there said, but it is perfectly obvious that with six feet of additional water standing on this farm it would stay on there much longer than with six feet less of water. There would be more current, greater velocity, more action and more damage. Again we say that what happened in 1937 is only some evidence of what may happen. It is conceivable that even a worse flood than that of 1937 may occur, and the increased depth and increased volume of water is bound to cause more damage than water which is six feet less in depth would cause. In this connection the Government attempts to argue that a greater depth of water occasioned by the artificial device of this project gives rise to no cause of action (Government's Brief, pages 24, 25, 33, 36). It is argued that the mere fact that waters are confined on the land in question would not constitute a taking, but merely consequential damages and a number of cases are cited. None of these bear out the Government's contention. We proceed to briefly discuss some of these cases.

In Hughes v. United States, 230 U. S. 24, the claim was against the United States for failing to build a levee in front of plantations for the purpose of affording them protection from the increased stage of high water which it was claimed had been created by the act of the United States in building levees elsewhere along the river. The overflow came from the inherent weakness of the existing levee and not from the new levee that had been constructed elsewhere. The situation was totally different from that in the case at bar.

In Sanguinetti v. United States, 264 U. S. 146, the United States constructed a canal for the improvement of navigation. The excavated material was put on the lower side of the canal, making a levee of which the dam was practically a continuation, and was the most convenient way to dispose of the material, and it also helped prevent erosion of the lower bank. During a flood the canal proved insufficient to carry off the waters which overflowed the lands of appellant, which would have been flooded to a certain degree had the canal not been constructed. None of it was permanently flooded, nor for such a length of time to prevent its use for agricultural purposes.

In Jackson v. United States, 230 U. S. 1, the owners of the property had built levees to protect the land from destructive overflows. The Government constructed a levee on the west bank of the river, opposite the lands of the appellant, which relieved the pressure on their private levees, but augmented the risk of overflow by increasing the danger of breaking. This Court held that a private individual had a right to construct a levee for the protection of his own property so long as he did not interfere with the natural flow of the stream, and, therefore, the United States, the State's levee boards, and similar agencies had the same power to construct levees, although in so doing the water was forced over the levee theretofore constructed by the individual.

In Bedford v. United States, 192 U. S. 217, the Government constructed revetments along the banks of the Mississippi at Delta Point for the purpose of preventing erosion and to force the current back into its former channel, after which the channel and current were gradually directed toward the lands of the Bedfords. The cause of the deflection of the river upon the property in question was its natural cut-off, not the construction of the revetments;

which did not change its course, but kept it at the point where nature placed it.

In Gibson v. United States, 166 U. S. 269, the Government constructed a dike at Louisville in the Ohio River. The appellant owned a tract of land fronting on the river. He had a landing on the island from which he loaded and shipped. By reason of the construction of the dikes ingress and egress were destroyed. This Court held there was no invasion or actual taking of appellant's property and that the damages were consequential. The landowners contended that by reason of the dam the natural flow of the Ohio River had been increased in depth and therefore the waters were obstructed and impeded in their natural flow, creating a permanent pool of water above the prior level. The Court found that the river had not been changed; that there was no permanent filling of the channel of a creek as a result of the construction of the dam; that part of the landowners' property was overflowed by the creek as a result of freshets coming down the creek from the hills and by backwater from the Ohio in times of flood; that this had always been true; that the dam had not increased or decreased the frequency or extent of these overflows.

The Court discusses a number of cases, nearly all of which have been cited in the briefs filed by counsel in this case, and then proceeds to quote from the case of Pumpelly v. Green Bay Company, 13 Wall. 166, saying:

> "Under these decisions and those hereafter cited, in order to create an enforceable liability against the Government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."

The Court expressly found that, prior to the construction of the canal, the land had been subject to the same periodical overflow.

The line of demarcation is well set out by Judge Hamilton in the dissenting opinion in the Franklin case, pending here on certiorari, wherein he says (l. c. 467):

> "There is a line of demarcation in each from the case at bar in that the water change was confined within the ordinary high-water level of the stream made by nature. There was no artificial increase in level, width or flow in any of these cases."

In the case at bar Congress intended to do the very thing that was done, that is, to build a structure which would cause the land in question to overflow more frequently and to a greater depth. In other words, Congress intended and intends to use this petitioner's land as a temporary reservoir to pass water which would not otherwise pass over his land when the height of fifty-five feet is reached on the Cairo gauge. It also intended to have water remain on this particular owner's land for a much longer period of time than it otherwise would remain thereon, and intended to have greater damage done by reason of deep water caused by the set-back levee. To put it another way, the damages herein involved are direct, and therefore there is a taking within the meaning of the Constitution, and since this same intention was present when the project was started by the building of the set-back levee, there was a taking as of that time.

Even the case of Matthews v. United States doesn't go as far as the Government contends. The Court found that any increased costs to plaintiff in the operations of a business or in the exploitation of his timber, or any depreciation in the value of his property because of such anticipated increased costs of carrying on operations over

the set-back levee are consequential damages. That was a totally different question.

Here we have the question of additional waters that are confined because of the set-back levee, and we have a showing that damage would be done. In the Matthews case the evidence showed there would be no damage. It was simply timber land, and when the water receded there would be no damage done by reason of it, while in the case at bar the evidence showed there would be damage to the buildings, caused by the increased depth of the water (R. p. 190).

There is nothing in the act which prevents the Government from taking over the riverside levee. On the contrary, everything points to the control, jurisdiction and operation of the riverside levee, as well as the set-back levee, by the Government. Certainly, the levee districts would have no right to touch the riverside levee, much less lower it or raise it. We think counsel are confusing the term "taking" with "use." The Government can take property and never use the same, but there is, nevertheless, the "**right**" to use the same at any time the Government sees fit or the occasion demands.

The big argument that the Government presents in its brief (page 30) is that a holding by this Court that there was a taking will entail additional expense. Of course it will. Is this any argument against the proposition that there is a taking? Is not the landowner entitled to be paid in full as of the time of taking, and if his property was taken, as we contend, at the time the set-back levee was built; and he could only sell his property or use the same subject to the servitude that the Government by law imposed upon his land, is he not entitled to be fully compensated? Is the fact that the landowner receives his money ten or more years after the taking any reason for refusing him just compensation? Does not this argument fall of its own weakness?

Then the further argument is presented that if the Government, having once taken the landowner's property, decided not to include it in the floodway, that it could politely hand the landowner's property back to him without any liability. This, forsooth, was the very proposition that was presented in United States v. Yazoo etc. R. Co., 4 Fed. Supp. 366, where the precise question was presented. It is obvious that the Government was unwilling to meet the issues in that case, because it had taken the property, and, therefore, was unwilling to have the Court of Appeals make a ruling on the question (Reversed and remanded on stipulation, 67 Fed. [2nd] 1019). The Government conceded in the Yazoo case, supra, that it could not dismiss a condemnation suit after a taking. Is not this argument convincing proof of the weakness of the Government's position?

It is next contended by the Government that if the riverside levee is permitted to remain fifty-eight feet on the Cairo gauge that there will be no increase in the frequency of the flooding. This is not the test of a taking. The lowering of the fuse plug section was only one of the things that was enjoined upon the Government. There is nothing in the act which sets out when the Government shall lower the fuse plug. It is like a man who buys a lot on which to build a house. The fact that he doesn't build the house doesn't change the fact that he has bought the lot and owns the same. Here the Government has taken the easement. The property owners could have brought proceedings under the Tucker Act on implied contracts, where the amounts involved did not exceed $10,000. This Court has so held. Hurley v. Kincaid, 285 U. S. 95. Furthermore, counsel for the Government in this Court undertakes to construe the Act by citing an objection made by counsel for the Government in the trial of this case (Rec. p. 198). This objection is cited as authority for the propo-

sition that the War Department construes section 1 of the Act as they are attempting to construe it before this Court. This kind of authority is on a par with the quotations which counsel for the Government give as having occurred during the debates in the House of Representatives for the purpose of proving the construction of the Floodway Act of May 15, 1928. They are entirely outside of the record, are nothing but pure hearsay, and are not proper before this Court. We challenge counsel to point out to this Court any ambiguity in the Flood Control Act. If there is no ambiguity, then legislative debates or committee reports cannot be considered, since they may be properly resorted to only to solve doubt as to the meaning of a statute or constitutional provision, **not to create it**, and such legislative history may not be used to support a construction which adds to or takes from the significance of the words employed. U. S. v. Missouri Pacific R. R. Co., 278 U. S. 269, 73 L. Ed. 322; Caminetti v. United States, 242 U. S. 470, 70 A. L. R. 16.

We have neither the time nor the inclination to introduce a lot of counter quotations from other legislators who might have had opinions. We fully recognize the right of this Court to resort to legislative debates where there is an ambiguity or a question as to the meaning of the phraseology used. In MacKenzie v. Hare, 239 U. S. 299, 50 L. Ed. 297, it was held that where a statute expressly declared that any American woman who marries a foreigner shall take the nationality of her husband, the report of the committee, upon which the legislation was enacted could not be resorted to, for the purpose of showing that the intention of Congress, in passing the act, was solely to legislate concerning the status of citizens abroad, and not to affect one remaining in the United States. This Court said:

> "The act is * * * explicit and circumstantial. It would transcend judicial power to insert limitations

or conditions upon disputable considerations of reason which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate."

It was further held that whatever was said in the debates or reports preceding the enactment of the law must give way to its language.

To the same effect was the reasoning and ruling in Lederer v. Real Estate Title Ins. & T. Co. (C. C. A. 3d), 295 Fed. 672, certiorari denied 265 U. S. 589. The Illinois court, in Hubbard v. Dunne, 276 Ill. 598, 115 N. E. 210, likewise held that resort could not be had to resolutions, memorials, messages, reports of commissions, engineers, etc., to obtain a construction of the term "deep waterway" in a constitutional amendment

ON THE QUESTION OF THE ENFORCEMENT OF THE CONTRACT.

With reference to the enforcement of the contract the Government seems to make the point (Government's Brief, page 15) that the petitioner pitched his case solely on the proposition that he can enforce the contract, disregarding the relevancy of the contract or the weight to be given it as a measure of the value of the easement. In this the Government is mistaken. Pleadings are used to call the Court's attention to the issues in the case. It matters not whether you call a pleading an answer and counterclaim, or whether you call it exceptions, or whether you call it motion for judgment, as was done in the case at bar. All three pleadings presented the same issues. They called the attention of the Court to the fact that the parties had made a contract, had placed a value upon the easement or had fixed the damages and were entitled to carry out the agreement. The Government admits that it could enforce

the contract in this proceeding and that the individual would be bound, but contends that it cannot be enforced against the Government in this case, because it contends that if the Government were held to its contract that in so doing the Government would be sued. We contend, in the first place, that in holding the Government to the contract price of the easement that the Court would merely enforce the agreement of the parties fixing the extent of the damages; that it would merely deny the Government the right to "welch" on its contract, just as the Court in the Wachovia case, cited in petitioner's and the Government's brief, denied the right of the landowner to do so in a similar contract.

In the second place, having entered into an admittedly valid contract and having fixed the damages, or the value of the easement, the Court should have held that the parties were precluded from endeavoring to put any other value on it and were precluded from offering evidence of value other than set out in the contract as was done in the Wachovia Bank and Trust Co. case, 98 Fed. (2nd) 609, where the Government enforced a similar contract. Therefore, the motion for judgment should have been sustained (R. 109) after the Government itself offered in evidence the testimony taken in Washington, D. C., proving the validity of the contract (R. 109).

Finally, the Government, having brought this suit, invited by implication a complete determination of all the issues involved in connection with the easement in question, among which was the value put upon the easement by the parties by contract. We, therefore, say that under any one of the three views the Court should have fixed the damages at the amount set out in the contract, namely, $31,681.98, and interest from the date of taking.

In the case of Owen v. U. S., 8 Fed. (2nd) 929, cited and relied on by the Government, the Government dismissed

the condemnation proceeding before there was a taking. The petition of the Government showed that it was not the Government's intention to take possession of the land until after judgment. There was no averment or allegation in the answer of the landowner that there had been a taking of the land described in the petition. Since the Government had a right to dismiss, and did dismiss, it left pending a suit against the Government for $20,000.00. The Court simply held that such a suit would not lie.

A reading of the opinion shows that if there had been a taking, as in the case at bar, that the Government could not have dismissed the action. Likewise, in the Yazoo case, cited supra, the Government admitted that if there was a taking it could not dismiss.

We have no desire to reiterate what we have set out in our original brief on the question of the liability of the United States to respond to a judgment against it where the United States comes into court as a suitor. There is absolutely no reason, in law, in principle, in equity or in fairness to distinguish between a suit in admiralty where the United States comes in as a plaintiff and a law case where the United States voluntarily comes into court. The principle, the reasoning, the justice, are identically the same.

It would seem that the Government is hard pressed for an argument on the question of the enforcement of the contract in question if the Government is compelled to resort to the argument that Section 774 U. S. C. A., Title 28, applies, in which it is provided that no claim for credit shall be admitted upon trial except such as appear to have been presented to the general accounting officer for examination and to have been by him disallowed in whole or in part. Is it the Government's contention that the law in question provides for the presentation by the contracting party with the Government, of such a contract to this account-

ing officer of the Treasury for his disapproval after the Government has repudiated the contract?

Can anyone imagine such a procedure? The contract had already been repudiated by the Government. It is obvious that this section of the statute has absolutely no application. This point is being raised by the Government for the **first time in this court.**

It is next contended that, even if the District Court had jurisdiction to adjudicate the petitioner's counterclaim based on the contract, he would not be entitled to recover interest: The cases cited are wholly without application. Interest is demanded, not because of the contract, but is demanded **from the time of "taking."** The contract fixes the value of the easement or the extent of the damages. Interest is payable as and from the **"time of taking."**

CONCLUSION.

In conclusion, we submit that there was one transaction and that the petitioner is entitled to have all of his rights adjudicated in this case. Common fairness, justice, as well as the equities, demand that the petitioner have all of his rights and obligations with the Government concerning this tract of land adjudicated in one action. The Government has in open court admitted, as set out on page 20 of petitioner's brief, that to obtain complete justice petitioner should be allowed, in one proceeding in the District Court, recovery on the contract to which he may be entitled, especially since the United States could have done so, in that forum, against him. The rule of the Thekla case governs the case at bar, for the reasons that we have heretofore set out, both in petitioner's original brief and in this reply brief. If the Government were to prevail in this action, the petitioner would be relegated to a claim for the difference between the recovery here and the contract price; that

difference, added to the judgment which was rendered in this case by the District Court, would total exactly $31,681.98, together with interest from the date of taking. What sense or reason would there be to compel this petitioner to proceed in some other forum to recover the difference if this Court says, as a matter of law, he is entitled to recover it?

The appellant is not asserting an independent claim against the Government. He is only asking compensation for the easement in question in accordance with the contract. The Government admits, and the Court of Appeals found, that the contract in question was a valid and binding contract. It is simply a question of whether it can be enforced. If the Wachovia case is the law, and we believe it is, then neither the Government nor the landowner has a right to dispute the value of the easement after they have entered into a solemn contract.

II.

We hope that this Court will not limit the application of the rule in the Thekla case to admiralty cases. Neither reason nor justice nor expediency require such a harsh doctrine. But if this Court should decide that it does not care to extend the Thekla doctrine, this Court can still do justice in the premises by holding that the parties having entered into a contract fixing the damages could not at the trial offer any evidence regarding the value of the easement or the damages to the property in question by reason of the easement other than that fixed by the contract. The Government itself having offered the testimony proving the validity of the contracts taken in Washington (R. 109) was bound by the same. This evidence showed the value put on the easement by the parties by contract and the Court should have sustained the motion

for judgment as requested by the petitioner (R. 109). While the Court could decide this part of the case for the petitioner on this point, we feel that the question is one of great importance to the public and should be decided by the Court squarely on the proposition that the Government, having filed this suit, by implication invited a determination of all of the issues involved, and all of the issues connected with the subject matter and transaction, which would include the contract covering the easement.

With reference to the question of taking, we submit that the record in this case clearly and unequivocally indicates that the property in question was taken either on the 21st of October, 1929, when the work on the set-back levee started, or, at the latest, on October 21, 1932, when it was completed.

We respectfully urge the Court to reverse the ruling of the trial court and the ruling of the Court of Appeals.

Respectfully submitted,

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